



POLICE DEPARTMENT

October 21, 2014

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Kathryn McKenna
Tax Registry No. 925716
52 Precinct
Disciplinary Case Nos. 2011-6562 & 2012-8746

The above-named member of the Department appeared before me on February 24, 2014, charged with the following:

Disciplinary Case No. 2011-6562

1. Said Police Officer Kathryn McKenna, while assigned to the 52nd Precinct, on or about June 24, 2010, having become aware of an allegation of corruption or serious misconduct involving a member of service, did fail and neglect to notify the Internal Affairs Bureau Command Center.

P.G. 207-21, Pages 1-2 ALLEGATIONS OF CORRUPTION AND OTHER
MISCONDUCT AGAINST MEMBERS OF THE
SERVICE

2. Said Police Officer Kathryn McKenna, assigned to the 52nd Precinct, while off-duty, on or about July 29, 2010, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Officer did wrongfully operate a motor vehicle while under the influence of an intoxicant.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

3. Said Police Officer Kathryn McKenna, assigned to the 52nd Precinct, on or about July 29, 2010, did wrongfully consume an intoxicant to the extent that said officer was unfit for duty.

P.G. 203-04, Page 1, Paragraph 2 – FITNESS FOR DUTY – GENERAL
REGULATIONS

Disciplinary Case No. 2012-8746

1. Said Police Officer Kathryn McKenna, assigned to the 52nd Precinct, on or about July 2, 2011, while on duty, engaged in conduct prejudicial to the good order, efficiency, and discipline of the Department, to wit: after receiving a radio transmission to respond to a "10-56," failed to conduct a proper investigation.

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT
P.G. 202-21, Page 1, Paragraph 5 POLICE OFFICER, DUTIES AND
RESPONSIBILITIES

The Department was represented by Vivian Joo, Esq., Department Advocate's Office, and Respondent was represented by Stuart London, Esq.

Respondent, through her counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2011-6562

Respondent is found Guilty.

Disciplinary Case No. 2012-8746

Respondent is found Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Lieutenant Alfred Vargas and Lieutenant Brian Sparber as witnesses. The Department also offered the out-of-court conversations between

Respondent and Police Officer Michael Hernandez and the transcription of said conversations (DX 3, DX 3A). The court provides a brief summary of the eight conversations between Respondent and Hernandez and incorporates by reference the eight conversations as Attachment A.

Summary of the Eight Out-of Court Conversations between Respondent and Hernandez

One: June 24, 2010 at about 4:22 p.m. The call lasted a minute and 44 seconds.

Hernandez was talking to a female about “drinking in the locker room.” There is no reference to what locker room he is referring to, but he states that this is the fifth night in a row when there is drinking in the locker room. The female was later identified as Respondent.

Two: July 29, 2010 at about 11:13 p.m. The call lasted 69 seconds between Hernandez and Respondent. Hernandez is trying to locate Respondent as they both drive on the highway. Hernandez mentions that there are several cops out on the road. Respondent says she is on Highway 287, but cannot state her intersection because there is a cop behind her and she has to stop. The call ends.

Third: July 29, 2010 at about 11:21 p.m. The call lasted three minutes, 42 seconds between Respondent and Hernandez. Hernandez is still trying to ascertain Respondent’s whereabouts. Respondent tells Hernandez to stop yelling at her and that she is at East

Archdale Avenue. Hernandez says he does not need Respondent to “take a DWI right now.” The call ends shortly thereafter.

Fourth: July 29, 2010 at approximately 11:26 p.m. The call lasted approximately seven minutes. Hernandez and Respondent are on the phone. He tells her to stay on the phone with him and to stop hanging up. She says she is in the vicinity of Bronx River Parkway South. Hernandez tells her that she needs to head north to head home. Respondent says she is on the overpass to the highway and does not know how to get home. Hernandez tells her that there are cops everywhere and she has to listen to him. Respondent makes an admission and replies, “...there right behind oh my god I’m getting pulled over, oh my god I’m gonna get fu**in arrested” Then Hernandez asks what road she is on, Respondent replies, “I have no idea.” Respondent gets flustered and says that she only sees two signs going south and no signs going north. Her speech seems somewhat slurred.

Fifth: July 29, 2010 at approximately 11:33 p.m. The call lasted approximately five minutes. Hernandez informs Respondent that he is starting to get mad. He states that he pulled over by the side of the road making sure that she gets home safe but she hangs up every time he asks where she is. Hernandez asks where she is and Respondent replies that she has no idea what town she is in. The call ends shortly thereafter.

Sixth: July 29, 2010 at approximately 11:41 p.m. The call lasted approximately nine minutes. Hernandez asks where Respondent is and she says she is lost and begins to

laugh. Hernandez asks why she keeps hanging up the phone and Respondent says she is not hanging up the phone, she is just not answering the phone because she cannot listen to Hernandez and get where she is going. Respondent notes that there is a lot of traffic and her speech sounds slightly slurred as she is talking. Hernandez informs her that he is at the Pleasantville exit on the Sprain Brook Parkway and he is parked there. He tells Respondent that she is at Hawthorne and that she will come up behind him any second. Without conversation, the call ends about 50 seconds later.

Seventh: July 29, 2010 at approximately 11:52 p.m. The call lasted approximately nine minutes. Hernandez asks where Respondent is and she stated that she is getting off at the Pleasantville exit, heading to their alcove. Hernandez states that he thinks he is at the Pleasantville exit and states, "I, I don't know. I'm a little drunk too." When Respondent says it is the [REDACTED] exit, Hernandez asks if it is the [REDACTED] exit and Respondent replies, "No. Yes, No. Yes. [REDACTED]" She says she is getting off at one seventeen, [REDACTED] exit. Hernandez says he is not sure if he went too far and tells Respondent to hold on and do not hang up the phone. Respondent replies, "Alright. I won't hang up the phone," and her speech is slurring.

Hernandez asks Respondent if she passed a car with four-way blinkers on. She replies with an admission, "I don't, I wasn't fu**in' lookin.' I'm drunk. What the fu** am I lookin' at." There is back and forth between Respondent and Hernandez. He tells her to stay on the phone. He tells her he is "blowing red lights" and is "probably gonna get a DWI." Respondent says she is parked and Hernandez tells her that he needs her to guide him. The call ends after 32 seconds of no conversation.

Eighth: July 30, 2010 at approximately 12:01 a.m. The call lasted approximately two and a half minutes. The call begins and Hernandez tells Respondent that she is “trying [his] patience.” She responds, “I have to go pee so whatever you want to do.” Hernandez informs her that he is lost three times. Respondent replies, “How do you not know where you are you little, what’s it’s alright, wher... wher... wher... where huhhhhh where are you.” Respondent’s speech is slurred. Hernandez tells her that he got off the Taconic [Parkway]. Hernandez asks her if she is in the parking lot and she responds, “... Yes, I’m sitting here, I’m peeing now in our parking lot because....” Hernandez asks if he will pass the Saw Mill [River Parkway] and she responds in the affirmative. He tells her to hold on and the call ends shortly thereafter.

Lieutenant Alfred Vargas

Vargas is a 17-year member of the Department and has been assigned to the Bronx Investigative Unit for the past seven years. On September 23, 2011, Vargas began investigating an allegation against Respondent for failure to conduct a proper investigation. His investigation was prompted by a letter received by the Police Commissioner’s Office from the uncle of the deceased Person A. The letter explained that on July 2, 2011 Person A’s therapist contacted 911 because he believed Person A was having suicidal thoughts and that on July 3, 2011 Person A was found in his apartment, unconscious due to being “overdosed on pills.” Person A was removed and taken to a hospital where he died four days later.

Vargas testified that Respondent and her partner (Police Officer Darren O'Donovan) had responded to Person A's residence on July 2, 2011 to conduct a "wellness check" because of the 911 call made by Person A's therapist. Neither Respondent nor O'Donovan made contact with Person A that day. Vargas was able to determine that it was Respondent and O'Donovan who responded to Person A's residence by reviewing a number of documents. First he reviewed documentation of 911 calls retrieved from the "SPRINT system." [Department's Exhibit (DX) 1 is the SPRINT report for July 2, 2011, a one-page document.] In addition to the SPRINT system, he also reviewed the audio recordings of radio transmissions and 911 call from July 2, 2011 and the accompanying transcripts. DX 2 is a compact disc recording of the radio transmissions dated February 12, 2014; and DX 2A is the accompanying transcript for the radio transmissions with corrections dated July 2, 2011.] And finally, he reviewed a copy of the command's "roll call" from July 2, 2011. The cumulative review of these documents lead Vargas to determine that Respondent and her partner were the two officers assigned and "designated to respond to that location" on July 2, 2011.

The SPRINT document indicated that the 911 caller believed Person A to be feeling suicidal. The radio transmission told Respondent and O'Donovan to "respond to this location to check on the condition of an individual." The transmission also included a code "10-56" which tells the responding officer "to check on a medical condition of an individual and determine whether any medical attention is required," which is also referred to as a "wellness check" or an "aided case." Vargas testified that according to the radio transmissions, Respondent had requested "a call-back for the job" which prompted the dispatcher to contact the individual who initiated the 911 call, Person A's

therapist. The dispatcher then informed Respondent, over the radio, that the complainant was the individual's therapist who believed Person A to be feeling suicidal and that Person A failed to show up for a scheduled therapy appointment. To which Respondent replied, "Copy that."

During his interview with Respondent, she informed him that after arriving on the scene she and O'Donovan knocked on Person A's door and neighboring doors and received no response. Respondent then conferred with the two Emergency Medical Services (EMS) personnel (employed by St. Barnabas Hospital) who had also arrived on scene and who told her that "they were okay with not making contact." Respondent stated she was "satisfied with that." Vargas explained that NYPD and EMS personnel do not share the same radio system or dispatchers. Respondent and O'Donovan marked the job "90 yellow" which means "unnecessary."

Vargas concluded that because Respondent and O'Donovan were informed of Person A's potentially suicidal condition they had not conducted a proper investigation to try to make contact with Person . Vargas said that Respondent and O'Donovan should have contacted a supervisor to respond to their location. In addition to contacting a supervisor, they could have attempted to locate a landlord or superintendent of the building who may have known Person A's whereabouts to confirm he was okay. O'Donovan admitted that he did not conduct a proper investigation and accepted a "B CD, command discipline, which was a penalty of three days."

On cross-examination, Vargas stated that the "10-56" code was possibly an error on the dispatcher's part because a "10-54" is a "wellness check" and that he does not know what "10-56" means. He acknowledged that even though wellness checks are

conducted “all the time” they are not actually mentioned in the Patrol Guide. During his interview with O’Donovan, Vargas learned that O’Donovan spoke with a neighbor who explained that their fire escape does not connect to the apartment O’Donovan was trying to access.

Vargas said he was not aware of officers relying on Emergency Medical Technicians (EMTs) to determine whether or not it is necessary to breach an apartment. Besides providing medical attention when needed Vargas does not know what procedures EMTs are required to follow or what role they play, but he does know that EMTs are under the jurisdiction of the Fire Department. The two EMTs who responded to the scene on July 2, 2011 were unable to provide any details to Vargas because neither of them remembered anything about the incident. Vargas conceded that the determination of misconduct hinged on the fact that Person A was home when Respondent and O’Donovan attempted, but failed, to make contact with him. Had Person A not been home, it is possible that no misconduct would have been found and therefore the officer’s conduct is “sort of being judged in hindsight based on the fact that there was someone there.”

Vargas then explained the two sections of the Patrol Guide Respondent violated on July 2, 2011. The first was section 202-21, subdivision 5 which, in Vargas’ words, requires officers to canvass and patrol their areas and investigate further or notify a supervisor of anything that seems “unusual.” However, he acknowledged the actual wording of that section and the second section she violated (203-10 subdivision 5) does not “say anything in there about notifying a patrol supervisor to respond.” It is not necessary to call a supervisor to the scene for every wellness check, or every time an officer is unsure whether or not someone is inside an apartment. But, Vargas testified

that officers who respond to wellness checks and whose attempts to gain access through a door or a fire escape fail, need to call a supervisor.

On redirect examination, Vargas explained that a member of service is not supposed to be guided by EMTs on the scene, but they can use information provided by EMTs to make a final determination. Furthermore, because Respondent was aware that Person A was suicidal and unaccounted for, the "level of concern" for Person A's condition should have been raised. Therefore, Respondent should have contacted a supervisor to make the determination of whether the apartment should be entered.

Lieutenant Brian Sparber

Sparber is an 11-year member of the Department and has been assigned to the Office of the Chief of Internal Affairs for 11 months. Sparber was involved in the administrative investigation that resulted from a 12-month wiretap investigation conducted by the Bronx DA's Office and the Department in 2010. Due to his role in the administrative investigation, Sparber was assigned to investigate two allegations against Respondent. One was for "failure to notify Internal Affairs of a misconduct allegation" and the second was a DWI, unfit for duty allegation. Evidence supporting these allegations were "intercepted on the wiretap" during telephone conversations between Respondent and Bronx Trustee, Michael Hernandez. [DX 3 is a compact disc containing eight telephone conversations between Respondent and Hernandez; and DX 3A is the 16-page accompanying transcript].

Respondent told Sparber that she had been at a restaurant with Hernandez on July 29, 2010 where she had "two drinks or a few drinks." Respondent, after listening to the

recorded conversations between herself and Hernandez, admitted to Sparber that, “she could have been drunk and should not have been behind the wheel, she exercised poor judgment.” In the first of eight conversations, which took place on June 24, 2010, Hernandez was telling Respondent about individuals “drinking in the locker room.” When Sparber questioned Respondent about that telephone conversation Respondent said she, “exercised poor judgment in not reporting it.” The other seven conversations took place on July 29, 2010 and July 30, 2010 and brought about the DWI allegations. In one of the seven conversations, Respondent made a comment which lead Sparber to believe Respondent could have been involved in a vehicle accident. In conversation three, Respondent stated at the end of the call: “Fu**, fu**, fu**, fu**, sh** fu**ing hit me,” silence then hang up. The call ends. However, Sparber was unable to “find any record of any accident” involving Respondent on July 29, 2010 and Respondent denied being involved in an accident that night.

On cross-examination Sparber agreed that there was no independent corroborating information to indicate Respondent had a drinking problem. Sparber also agreed that Respondent said she does not drink and drive home and that Respondent was not stopped by the police on July 30, 2010. No alcohol was recovered from Respondent’s vehicle, nor was any alcohol testing conducted. Sparber explained that although the conversations took place on July 30, 2010 [the 29th and the early morning hours of July 30], he did not hear them until he began his investigation in “mid March 2011.” However, Sparber believes that “IAB personnel were staffing the wire in real time” so someone would have heard the conversation as it was taking place. According to Sparber, to his knowledge IAB did not take any immediate action to verify whether

Respondent was actually pulled over by the police, to check the physical condition of her car or search for beer cans within her car, even though IAB had the resources to do so.

Sparber did not know if avoiding compromising the wiretap investigation was the reason no action was taken in July 2010 to address Respondent's conversations. Sparber agreed that there was no independent corroboration for the recorded conversations.

During his interview with Respondent, Sparber asked if she was drunk when she was talking on the phone with Hernandez. To which she responded, "I'm saying that if I was listening to this tape, it sounds like I could be drunk on that tape, but I know myself well enough to know that I wouldn't do that." Respondent, during the same interview, told Sparber that she exercised poor judgment in getting behind the wheel because she had a couple of drinks.

Regarding the failure to notify IAB charge, Sparber acknowledged the fact that the drinking Hernandez was referring to took place in the men's locker room at the 52 Precinct [where both Respondent and Hernandez were assigned] and that generally women are not allowed in the men's locker room. Sparber further acknowledged that to his knowledge no supervisor inspected the locker room and no beer cans were recovered. Sparber agreed that the reason Respondent was charged with failing to notify IAB was because Hernandez discussed the drinking in the locker room during a telephone conversation with Respondent on June 24, 2010.

Sparber then explained the procedure followed in order to deem a police officer unfit for duty. He said the procedure requires two supervisors to consider a variety of factors, all of which require the supervisors to examine the physical condition of the suspected police officer none of which occurred here. Regarding the DWI charge,

Sparber stated that he has been involved in at least three to four DWI cases and that it is not necessary for the individual to be pulled over while driving the vehicle in order to be charged with DWI. Sparber conceded that there were no witnesses, besides the IAB personnel monitoring the wiretap, to the conversations between Respondent and Hernandez. Besides Respondent's statements, nothing besides background noise was used or done to determine the accuracy of Respondent's location or the accuracy of her statements, including GPS and video surveillance.

On redirect examination Sparber stated that by the time he began his part of the investigation the affected members of service were aware that "something was going on in the Bronx District Attorney's Office involving phones." He further agreed that during the majority of the official Department interviews, members of service were "confronted with their conversations contained in the wiretap."

On recross-examination Sparber clarified that he became involved in the investigation "around March 2011" and by that time, members of the service were aware of a wiretap. Sparber had no indication that Respondent had knowledge of the wiretap.

Respondent's Case

Respondent testified in her own behalf.

Respondent

Respondent is a 14-year member of the Department and has been a patrol officer her entire career. Respondent testified that on July 29, 2010 she had a couple of glasses of wine with Hernandez in a White Plains restaurant. After her two glasses of wine,

Respondent proceeded to drive to her home in Pleasantville. She stated she was not drunk and was able to drive. She also agreed that during her official Department interview she told Sparber that she exercised poor judgment by getting behind the wheel due to a "general principle" that you should not have "any alcohol on your breath" while driving. Respondent said she has never missed work due to drinking too much and alcohol has never affected her job.

In one of the seven intercepted conversations Respondent had with Hernandez on July 29 and July 30, Respondent told Hernandez she was lost while driving home after they had dinner. However, Respondent testified that she was not initially lost. She lied to Hernandez when she said she was lost because they were in a relationship and he wanted to meet up with her but she did not want to meet up with him. Respondent explained that during that conversation she did actually become lost and ended up in Hartsdale, an area with which she was not familiar. She was able to locate a familiar street and make her way home; she never met up with Hernandez that evening. Additionally, Respondent said her statements, "I'm whacked, I'm drunk," were not accurate and she only made those statements to get Hernandez to stop following her. Respondent explained that even though Hernandez told her about people drinking in the locker room, she did not report it because she did not personally observe it and was therefore unsure of the accuracy of the statement.

Regarding the wellness check on July 2, 2011, Respondent and O'Donovan arrived on scene and knocked on the apartment door but no one answered. They knocked on neighboring doors and O'Donovan was able to get into one of the neighboring apartments, but "the fire escapes did not connect." Respondent said she requested a

“call-back” which prompts Central to “call the number back to get more information on what should be happening and what’s the purpose of the job.” The only additional information Respondent received was that Central was “speaking to a therapist.”

Respondent said that EMTs on the scene were on the phone with a third party who “was telling them that ...this individual was not in the apartment.” Respondent said she was “satisfied that no one was in there” because she believed EMTs were not allowed to leave the scene if they believe someone is in the apartment. Respondent said she did not call a supervisor because the EMTs were “certain that there wasn’t anybody inside the apartment” and that she was “guided” by the EMTs. Respondent feels she handled the job properly and did a proper investigation.

On cross-examination Respondent stated (regarding the wellness check on July 2, 2011) that she did not try to gain access by contacting the building superintendant or by calling the patrol supervisor. Respondent acknowledged that EMTs do not work for the Department and if both EMT and her patrol supervisor were on scene, she would be guided by her patrol supervisor. Respondent agreed that she did not make contact with “the aided” on July 2, 2011 and she therefore marked the job “10-90 yellow.”

Upon further questioning, Respondent explained that she cannot recall if, during the wellness check, the 911 dispatcher stated that the therapist thought Person A was suicidal. She also could not recall who spoke to Central, she or her partner. Respondent could also not recall how she and O’Donovan gained access to the building, whether the building was a “buzz system” or if the door was open. Furthermore, as far as Respondent could recall she did not have contact with the superintendent of the building.

Respondent agreed that she and Hernandez had a [REDACTED] relationship, however her relationship and friendship with Hernandez no longer existed. The night before Hernandez told Respondent about the drinking in the locker room, Respondent said that Hernandez was "very angry" and he told her that he would call her the following day. However, Respondent called him the following day instead because she was concerned about his behavior the night before. It was during that conversation that Hernandez told Respondent about the drinking in the locker room (see Conversation One).

Respondent acknowledged that drinking in the locker room is not allowed and constitutes misconduct, but she did not notify the Department because she did not observe the misconduct herself. According to Respondent, she would only report misconduct to the Department if she observed the misconduct. However, in her official Department interview, Respondent said that she exercised poor judgment by not reporting the misconduct to the Department.

Respondent admits to having a couple glasses of wine at a restaurant in White Plains with Hernandez on July 29, 2010. After consuming the wine she felt she was capable of driving to her home in [REDACTED] which takes "approximately 15 to 20 minutes." Respondent has lived her entire life in and around [REDACTED]. While driving home on July 29, 2010 Hernandez was trying to follow her and determine her location so they could meet afterwards. However, she was trying to avoid him so she lied and told him she was lost. Respondent testified that Hernandez knew where she lived and that he would go near her house, but he would not go "in front" of her house because he also knew she was married and he did not want a confrontation with her husband. Respondent

conceded that during a couple of conversations Hernandez did not know where she was and was trying to find her.

Respondent agreed that she had the option of not answering his six phone calls, but stated that Hernandez is "persistent." She admits to initiating one of the phone calls. Respondent does not recall making the comments about getting arrested: "...there [they're] right behind oh my god I'm getting pulled over, oh my god I'm gonna get fu**in arrested." She admitted that if Hernandez believed she was about to be arrested he would have been concerned for her safety and would want to know her location. During her official Department interview she stated that she exercised poor judgment when she decided to drive and when asked if she was unfit to drive she said that she "shouldn't have been behind the wheel of a car" because she had "drunk something."

FINDINGS AND ANALYSIS

Disciplinary Case No. 2012-8746

Respondent stands charged herein in that while assigned to the 52nd Precinct, on or about July 2, 2011, while on duty, engaged in conduct prejudicial to the good order, efficiency, and discipline of the Department, to wit: after receiving a radio transmission to respond to a "10-56," failed to conduct a proper investigation.

Vargas, assigned to the Bronx Investigation Unit, testified that on the incident date, July 2, 2011 Respondent and her partner responded to the location. They knocked on Person A's door and neighboring doors and received no response. Respondent then conferred with two EMS personnel who stated that they were okay with not making contact with Person A. Respondent stated that being, "Satisfied with that," she and her

partner, O'Donovan marked the job "90 yellow" (unnecessary). The problem with this conduct is that Respondent and her partner received a job to do a wellness check. Vargas noted that the SPRINT document indicated that the caller believed Person A to be feeling suicidal and that they needed to "respond to the location to check on the condition of an individual." Vargas further testified that the transmission also included a code "10-56." This told the responding officers to check on the medical condition of the individual and determine whether any medical attention is required.

Based on the nature of the job Respondent and her partner were responding to, they had a duty to do more than just knock on a few doors. Respondent and her partner had the foresight to request a call back regarding the job to gather additional information. They learned from speaking to central, who spoke to Person A's therapist that the therapist was concerned that Person A was suicidal since he failed to appear for a scheduled therapy appointment. They knew or should have known that the nature of the 911 call required that they make contact with Person A. Vargas said they should have contacted a supervisor to come to the scene. This would have aided Respondent and her partner in determining a means to attempt to gain access to the apartment. At a minimum, Respondent could have attempted to locate the landlord or the superintendent of the building who may have known Person A's whereabouts or helped them to gain access to the apartment to ascertain Person A's condition. The fact remains that the following day Person A was found in the apartment where Respondent responded, unconscious and later succumbed to his overdose.

Accordingly, Respondent is found Guilty of Specification No. 1.

Disciplinary Case No. 2011-6562
Specification Nos. 1, 2 and 3

Respondent stands charged in Specification No. 1 in that while assigned to the 52nd Precinct, on or about June 24, 2010, having become aware of an allegation of corruption or serious misconduct involving a member of the service did fail and neglect to notify the Internal Affairs Bureau Command Center. In Specification No. 2, Respondent stands charged in that while assigned to the 52nd Precinct, while off-duty, on or about July 29, 2010, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Officer did wrongfully operate a motor vehicle while under the influence of an intoxicant. In Specification No. 3, Respondent stands charged in that while assigned to the 52nd Precinct, on or about July 29, 2010, did wrongfully consume an intoxicant to the extent that said officer was unfit for duty.

Evidence adduced at trial established that during the course of a Bronx wiretap investigation done by the Department in conjunction with the Bronx District Attorney's Office, several wiretaps were intercepted which involved Respondent. Specifically, two allegations were made against Respondent: one was for failure to notify IAB of a misconduct allegation. The second allegation was a DWI, unfit for duty allegation. In the first instance, Respondent was caught on wiretap engaged in a conversation with a Bronx Patrolmen's Benevolent Association (PBA) Trustee named Michael Hernandez. (See DX 3 and DX 3A, a compact disc and transcription, respectively, of the conversations). Hernandez was talking to Respondent about individuals drinking in the locker room. (**Conversation one**). He told Respondent during the conversation that he did not want to be in the locker room when they are drinking because it is getting "old for

me.” He said they have been “drinking for like the fifth night in a row.” Respondent says in response words to the effect, “Oh yeah. What happened when you said you had something going on, I thought something [was] happened to you?” There was no additional information to corroborate this account. When Sparber the investigator interviewed Respondent with respect to this matter, Respondent stated that she “exercised poor judgment in not reporting it.” Sparber explained that the allegation referred to drinking in the men’s locker room at the 52 Precinct where both Respondent and Hernandez were assigned. He acknowledged that women were not allowed in the men’s locker room and that he was unaware of any supervisor who actually inspected the locker room and recovered any beer cans, for example.

Respondent testified that although she stated that she exercised poor judgment in not reporting the incident, she had no personal knowledge that the drinking in the locker room actually took place. She explained that this was the reason why she did not report the allegation. The problem with this account is that she was made aware of an allegation of misconduct. If she believed that Hernandez was telling her the truth about what was going on at their precinct, then she did have a duty to report what she learned. She did not have first hand knowledge, but she could report that she was told by someone in the command that drinking was taking place daily in the men’s locker room.

Accordingly, Respondent is found Guilty of Specification No. 1.

With respect to Specification Nos. 2 and 3, Respondent had additional cell phone conversations with Hernandez (See DX 3). On July 29, 2010, Respondent had several conversations with Hernandez lasting from one to nine minutes. They were both driving

in separate vehicles. Hernandez made reference to the fact that several police officers were on the road and he did not want Respondent to "take a DWI." During one of the conversations, Hernandez informs Respondent that there are cops everywhere.

Respondent replies with an admission, "[They're] right behind oh my god I'm getting pulled over, oh my god I'm gonna get fuc**in arrested." (**Conversation four**) At several points during the conversations, Hernandez tells Respondent that he has pulled off at the side of the road and he is concerned for her safety. He repeatedly asks her to identify her location which she wavers about. At one point he asks her if she passed a car with four-way blinkers on. Respondent replies with another admission, "Don't I wasn't fu**in lookin.' I'm drunk. What the fu** am I lookin' at." (**Conversation seven**). There are times when her speech seems slurred, such as: "Alright. I won't hang up the phone," (**Conversation seven**) and "...wher...wher...wher...where huhhhhh where are you." (**Conversation eight**). During another call she informs Hernandez that she is at the parking lot where [REDACTED] and she says, "I'm peeing now in our parking lot...." (**Conversation eight**).

Sparber, the investigator of this matter testified at trial that when he questioned Respondent about the events of July 29, 2010, she told him that she had been at a restaurant with Hernandez where she had "two drinks or a few drinks." After listening to the recorded conversations, Respondent admitted to Sparber that, "She could have been drunk and should not have been behind the wheel, she exercised poor judgment." Based on Respondent's own admissions in the recordings and in what she told Sparber, Respondent acknowledged that she had operated a motor vehicle while under the influence of an intoxicant. In addition, the fact that she admitted that she "could have

been drunk” and stated in fact, during conversation that she was drunk, appears to be a further admission that she was unfit for duty. At trial Respondent tried to argue that her statements to Hernandez, “I’m whacked, I’m drunk,” were really inaccurate and they were only said to get Hernandez to stop following her because she really wanted to get away from him. The effect, however, was to get Hernandez to keep calling her and to try to get her location because he was concerned for her safety and he kept stating this in each subsequent telephone conversation. There were at least six cell phone calls by Hernandez to Respondent at that time. Respondent also made one phone call to him. If Respondent was not impaired and thinking clearly, it would have made more sense for her to state that she was home and her husband was there and she would talk to Hernandez at a later time. Instead she told Hernandez that she was urinating in the parking lot [REDACTED]. Respondent’s account lacked credibility. Thus the slurred speech, admission that she was drunk during her conversation with Hernandez, her admission to Sparber that she exercised poor judgment in operating a motor vehicle on July 29, 2010, and her statement to Hernandez that she was urinating in a parking lot, taken together are indicia that Respondent was unfit for duty and there is no requirement that Respondent be observed by a superior officer under these circumstances.

Patrol Guide § 203-04 Fitness for Duty in effect on the incident date of July 29, 2010 states in pertinent part:

1. Patrol Guide 203-4, “Fitness For Duty” mandates the following:
 - a. Be fit for duty at all times, except when on sick report.
 - b. Do not consume intoxicants to the extent that member becomes unfit for duty.

There is no requirement that a supervisor evaluate Respondent in this instance.

Respondent's own admissions and statements about her actions (i.e., urinating in a public parking lot) evince that she was unfit for duty while operating a motor vehicle.

Accordingly, Respondent is found Guilty of Specification Nos. 2 and 3.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on March 1, 2000. Information from her personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has been found Guilty of failing to notify IAB when she became aware of an allegation of corruption or serious misconduct, (i.e., that there was drinking in the precinct locker room), operating a motor vehicle while under the influence of an intoxicant, being unfit for duty and failing to conduct a proper investigation after receiving a radio transmission for a wellness check where a person later committed suicide by overdosing on pills. The Assistant Department Advocate asked for a penalty of the forfeiture of 35 vacation days, one year dismissal probation, cooperation with counseling and ordered breath testing. The Court agrees.

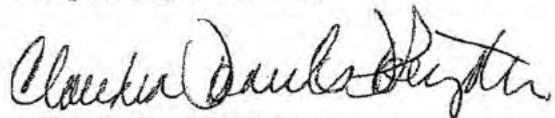
While it is not within the purview of this Court to recommend ordered breath testing and cooperation with counseling as part of the penalty recommendation following trial, the Court recommends that the requirements under Interim Order, "Conducting ordered breath testing of uniformed member of the service for the presence of alcohol"

issued on April 22, 2005 and in effect in 2010 should be adhered to, particularly as recommended by this tribunal in negotiated pleas of a similar nature as precedent.

In Disciplinary Case No. 82995/07 (August 4, 2009), an eight-year member of the service with no prior disciplinary record forfeits 30 vacation days, 30 suspension days already served, is placed on one year dismissal probation and agrees to submit to ordered breath testing and to cooperate with counseling for being unfit for duty, driving while intoxicated, and refusing to submit to a breathalyzer test.

Accordingly, it is recommended that Respondent be DISMISSED from the New York City Police Department, but that the penalty of dismissal be held in abeyance for a period of one year pursuant to section 14-115 (d) of the Administrative Code, during which time she remains on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. I further recommend that Respondent forfeit 35 vacation days.

Respectfully submitted,



Claudia Daniels-DePeyster
Assistant Deputy Commissioner-Trials

APPROVED

JAN 26 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER KATHRYN MCKENNA
TAX REGISTRY NO. 925716
DISCIPLINARY CASE NOS. 2011-6562 & 2012-8746

In 2011, Respondent received an overall rating of 3.0 “Competent” on her annual performance evaluation. In 2012, she received a rating of 4.0 “Highly Competent,” and in 2013 she received a rating of 3.5 “Highly Competent/Competent.” Respondent has received two Excellent Police Duty medals and one Meritorious Police Duty-Integrity medal in her career to date.

[REDACTED]

[REDACTED]

[REDACTED]

In 2011 and 2013, Respondent received a negative annual performance evaluation which was low in behavioral dimensions.

Respondent has no prior formal disciplinary record.

For your consideration.



Claudia Daniels-DePeyster
Assistant Deputy Commissioner – Trials